Office Supreme Court, U.S.
FILED
MAY 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSUMERS UNION OF UNITED STATES, INC. AND VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellants,

v.

VIRGINIA STATE BAR, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ELLEN BROADMAN
Counsel of Record
ALAN MARK SILBERGELD
1511 K Street, N.W., #1033
Washington, D.C. 20005
(202) 783-6130

JAMES W. BENTON, JR.
HILL, TUCKER & MARSH
509 N. Third Street
Richmond, Virginia 23261
(804) 648-9073

THE CASILLAS PRESS, INC. – 1717 K Street, N.W. – Washington, D.C. – 223-1220

TABLE OF AUTHORITIES

Cases: **Page**

Consumers Union v. Virginia State Bar,
100 S. Ct. 2980 (1980) 2

Supreme Court of Virginia v. Consumers Union,
446 U.S. 719 (1980) 2

Statutes

Civil Rights Attorney's Fees Awards Act,
42 U.S.C. Section 1988 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1664

CONSUMERS UNION OF UNITED STATES, INC. AND VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellants,

v.

VIRGINIA STATE BAR, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellees have moved this Court to dismiss this appeal or affirm the judgment of the District Court dated January 8, 1981. This brief is filed in opposition to the motion.

I. THIS COURT HAS JURISDICTION TO CORRECT THE DISTRICT COURT'S FAILURE TO FOLLOW THIS COURT'S MANDATE.

The Jurisdictional Statement alleges that jurisdiction lies with this Court to correct the misapplication of its mandate by the District Court.[1] Appellees attempt to defeat such jurisdiction by arguing that the District Court's decision to deny fees complied fully with this Court's mandate.[2] However District Court's holding contravenes the decision of this Court, based on the record in this case, that "[w]e are not convinced that it would be unjust to award fees against the State Bar."[3] This Court rejected the District Court's earlier holding that an award against the Bar was unjust because of the Bar's effort to amend the Rule. It explained that "[f]ee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion had a state legislature acted or *reacted* in a different or more timely manner there would have been no need for a lawsuit or for an injunction."[4] This Court then vacated the decision not to award fees against the Virginia Bar and remanded the case to the District Court for reconsideration in light of *Supreme Court of Virginia v. Consumers Union.*[5]

On remand, the District Court adhered to its previous view, which had been rejected by this Court, that fees should not be awarded solely because of the Bar's

---

[1] Jurisdictional Statement at 3.

[2] Motion to Dismiss or Affirm at 6.

[3] *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 749 (1980).

[4] *Id.* at 749 (emphasis added).

[5] *Consumers Union v. Virginia State Bar*, 100 S.Ct. 2980 (1980).

endeavors to amend the Rule.[6] This flagrant disregard of the considered mandate of this Court establishes this Court's jurisdiction over the appeal.

II. THE DISTRICT COURT'S DECISION SHOULD BE SUMMARILY REVERSED.

Appellees argue that the District Court acted within its discretion so that its ruling that a fee award against the Bar would be unjust should be affirmed summarily.[7] Quite to the contrary, that decision represents such an egregious abuse of discretion that the decision should be reversed summarily.

The District Court denied a fee award against the Bar solely because of its effort to have the unconstitutional rule amended. The District Court ignored the Bar's major role in the infringement of the Consumer Groups' constitutional rights. The Bar proposed the Rule, enforced the Rule and informed attorneys they could not participate in the attorney directory under the Rule. After forcing the Consumer Groups to bring this lawsuit to protect their rights, the Bar did propose changes to the Rule. However, those changes would not have protected the very constitutional rights at issue in this case; instead, they would have prevented the Consumer Groups from publishing their entire attorney directory.

If this flimsy and tardy proposal can defeat an award of fees, precious constitutional rights will again become

---

[6]Appellees suggest that fees were not granted against the State Bar because it acts merely as an administrative agency of the Supreme Court. Motion to Dismiss or Affirm at 7-8. However, the District Court denied fees solely because of the efforts of the Bar to have the Rule amended. Jurisdictional Statement at 4a.

[7]Motion to Dismiss or Affirm at 7-8.

hollow promises that few can afford to enforce. Enforcement officers may be able to absolve themselves of fee liabilities merely by proposing unconstitutional statutory amendments to unconstitutional laws during the course of litigation. And Congressional objectives underlying the Civil Rights Attorney's Fees Awards Act will be defeated. To preserve the rights afforded by CRAFAA, this Court should reverse summarily the decision not to award fees against the Bar because of its effort to have the Rule amended. Such reversal is required to bring the District Court's decision into conformity with this Court's earlier mandate.[8]

Respectfully submitted,

ELLEN BROADMAN
Counsel of Record

ALAN MARK SILBERGELD
1511 K Street, N.W., #1033
Washington, D.C. 20005
(202) 783-6130

JAMES W. BENTON, JR.
HILL, TUCKER & MARSH
509 N. Third Street
Richmond, Virginia 23261
(804) 648-9073

[8]Appellants' affiliates are set forth in the Motion To Defer Consideration of Jurisdictional Statement at (i).